In the

Supreme Court of the United States

October Term, 1960

No. .....

James Lana,

Petitioner,

—against—

State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Frances Kahn

Member of the Bar of the Supreme Court of the United States

Office & P. O. Address

401 Broadway

New York City 13, New York

WOrth 6-4240

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—against—

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on April 22, 1960, denying leave to appeal to that Court. In effect, it affirmed the Appellate Division, Second Department, 10 App. Div. 2d 646.

NO OPINIONS BELOW

No opinions were rendered either by the Trial Court, or by the Appellate Division, Second Judicial Department, 10 App. Div. 2d 646, or by the Court of Appeals of the State of New York. The appendix annexed hereto contains

the Certificate denying leave to appeal to the Court of Appeals of the State of New York (FULD, *J.*) rendered April 22, 1960. An extension of time to file the petition for certiorari was granted by Mr. Justice Frankfurter to and including July 27th, 1960.

JURISDICTION

The certificate denying leave to appeal to the New York State Court of Appeals was pronounced on the 22nd day of April, 1960, and an order extending the time to file the within petition for certiorari was extended to and including July 27, 1960 by Associate Justice of United States Supreme Court, FELIX FRANKFURTER, on July 20th, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. A. §1257(3).

The following are believed to sustain jurisdiction:

Ex post facto clause, Article 1, §10, United States Constitution;
Ex parte White, 14 Pick. 90.

QUESTION PRESENTED

1. Whether fact that state statutes imposing increased penalties for punishment for third narcotic offense, was not in effect when petitioner was first sentenced for two prior Federal convictions, made application of such sections in sentencing him as a third felony narcotic offender to a term of life imprisonment, *ex post facto*.

PROCEDURAL HISTORY OF THE CASE

This was an appeal by the petitioner from a judgment of conviction rendered against him on the 24th day of November, 1958, by the County Court of the State of New York, County of Kings (55).*

After various hearings begun on May 6, 1958, had in the County Court, Kings County, before the Honorable Judge HYMAN BARSHAY, the petitioner was convicted upon his own plea of guilty and was sentenced to Sing Sing for a term of from fifteen years to life, as a third felony narcotics offender (58). The petitioner appealed from the said judgment of conviction. It was affirmed unanimously, without opinion, 10 App. Div. 2d 646. Leave to appeal to the Court of Appeals was denied by Hon. Justice STANLEY H. FULD.

The People were represented by the Hon. Edward S. Silver, District Attorney of Kings County. The petitioner, on the appeals was represented by Frances Kahn, Esq.

The petitioner, James Lana, is presently confined in Clinton State Prison, at Dannemora, N. Y., as Number 35461.

He was convicted on May 12, 1958 after voluntarily interposing a plea of guilty (22-5), in the County Court of Kings County, of the crime of violation of Section 1751 of the Penal Law, subdivision 3, New York Penal Law.

On June 30, 1958, he was arraigned on an Information filed by the District Attorney, accusing him of being a multiple narcotic offender (26-36). The defendant stood mute (36). The Information relative to within indictment

* References in parentheses, unless otherwise indicated, are to pages of the certified printed Record presented herewith to this Court.

sets forth the gist of the two distinct Federal indictments (8-11).

In the interim, motions had been submitted to the United States District Court, Southern District of New York, to expunge from their records the two Federal convictions involving narcotics which were being used against him in Kings County as a predicate for multiple punishment pursuant to Section 1941 of the Penal Law (46).

Thereafter, on November 3, 1958, the defendant admitted his identity as to being the same person who was convicted and sentenced in the Information read to him in County Court, Kings County (51).

Subsequently, a decision was handed down by the Federal Court, Southern District, denying defendant's application to vacate the two Federal convictions brought on the ground he was deprived of legal assistance at both Federal judgments of convictions (56).

On November 24, 1958, he was sentenced to a term of not less than fifteen years and not more than life imprisonment as a third felony narcotics offender, and the basis therefor was the aforesaid two prior Federal narcotic convictions (8-11) determined by Kings County Court to be crimes which constitute felonies within the meaning of New York law notwithstanding the fact that it was error and violative of Article 1, §10, of the United States Constitution for a state trial court to impose upon petitioner a Life sentence where the earlier convictions were for crimes committed before the enactment of the statute.

Petitioner's contention here of *ex post facto* statutes was raised before the Trial Court; in the Appellate Division, Second Department, and before the Court of Appeals.

FACTS MATERIAL TO THE QUESTION PRESENTED

The Applicable Statutes

New York Penal Law:

Section 1751, subdivision 3, reads, in part:

> "Any person who shall possess or have under his control, in violation of any section of article thirty-three of the public health law * * * shall be punishable by imprisonment * * *"

Section 1941, subd. 2, sets forth the manner of multiple offender punishment. The section reads in this manner:

> "2. A person, who, after having been twice convicted within this state, of a felony or of an attempt to commit a felony under section seventeen hundred fifty-one of this chapter or under any other law relating to narcotic drugs, or, under the laws of any other state, government or country, of a crime under any law relating to narcotic drugs which, if committed within this state, would be a felony, commits a felony under section seventeen hundred fifty-one of this chapter, or under any other law relating to narcotic drugs, within this state, shall be sentenced upon conviction of such third offense to imprisonment in a state prison for an indeterminate term the minimum of which shall be not less than fifteen years, and the maximum thereof shall be his natural life". (eff. July 1, 1952).

We maintain, with all due respect, that the learned Trial and Appellate Courts below were in error; that it was not for a crime that would be a felony under New York standards at that time; that petitioner's prior Federal convic-

tions, as aforesaid, was improperly used as a predicate for additional punishment; since the Federal statutes in question in 1931 and 1937 include components of the crime which are not contained in the applicable statutes of the Penal Law and Public Health Law of this State during those years, this statute, therefore, has no counterpart under New York law, and the convictions had herein under such Federal statutes cannot be made the basis for multiple offender punishment in this State as provided by Section 1941, New York Penal Law. Too, petitioner asserts that the trial court at the state criminal proceeding was not justified in imposing upon him a Life sentence, for the reason that at the time one of said prior federal offenses was committed, (a) N. Y. Penal Law, §§1941 and 1751 were not in force; (b) when enacted subsequent thereto, and read together, provided for a maximum sentence of ten years.

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE AN IMPORTANT QUESTION AFFECTING *EX POST FACTO* LEGISLATION AS UNCONSTITUTIONAL IN THE STATE COURTS AND THE RIGHTS OF PETITIONER UNDER THE FOURTEENTH AMENDMENT ARE INVOLVED.

Resort is had to Article 1, Section 10, of the United States Constitution and it is asserted that the application of the statutes to offenses committed prior to its enactment renders it *ex post facto*. To test this contention we turn to the well-known case of *Calder* v. *Bull* (3 U. S. [Dall.] 386), for a classic definition of *ex post facto* laws.

> "1. Every law that aggravates a crime, or makes it greater than it was when committed. 2. Every law that changes the punishment, and inflicts a greater

punishment than the law annexed to the crime when committed."

New procedure may be made applicable to offenses previously committed without violation of the Constitution so long as the changes effected do not come within any of the classes outlined above. (*Beazell* v. *Ohio*, 269 U. S. 167, 170; *People* v. *Qualey*, 210 N. Y. 202, 208.) The changes in the case at bar inflicted a greater punishment which are to the substantial disadvantage of the accused. A statute by reason of working a substantial detriment to the accused may be deemed *ex post facto* although it does not come within the classification outlined in *Calder* v. *Bull*, *supra*. A statute which changes the punishment which may be imposed for a crime theretofore committed is *ex post facto* only if it prescribes or permits the imposition of a greater sentence. *People ex rel. Pincus* v. *Adams*, 274 N. Y. 447, 457. Similarly in *Lindsey* v. *State of Washington*, 301 U. S. 397, the net effect of the change was to increase the punishment which might be imposed on the prisoner.

It is therefore apparent that the application of the new statutes for third felony narcotic offenders, to crimes committed prior to its enactment, are *ex post facto* and in violation of Article 1, Section 10, of the United States Constitution, U. S. C. A., since the effect thereof is to increase or make more onerous the "standard of punishment" which may be imposed. *People ex rel. Horowitz* v. *Lawes*, 168 Misc. 772, 5 N. Y. S. 2d 1021.

In the area of criminal law, statutes which increase the punishment for previously committed crimes, have always been regarded as oppressive and prohibited, as *ex post facto* laws, by the Federal Constitution. (*People* v. *Hayes*, 140 N. Y. 484, 490-491.) There is no place in the scheme for punishment for its own sake, the product simply of ven-

gance or retribution. (See Michael & Wechsler on Criminal Law and its Administration [1940], pp. 6-11; Note, 55 Col. L. Rev., pp. 1039, 1052.)

A statute imposing an additional punishment for a third offense cannot operate on convictions previously had, to increase their effect as prior sentences, for the purpose of making a subsequent offense punishable by imprisonment for life in case the prisoner has been twice before convicted of offenses punishable by imprisonment at hard labor for a term of years. *Ex parte White*, 14 Pick. 90.

Under the foregoing statutes the pertinent question is: Does the life imprisonment sentence violate the *ex post facto* clause of Article 1, Section 10 of the Constitution of the United States? We submit it does. In *Lindsey* v. *State of Washington, supra*, the Supreme Court of the United States applied the *ex post facto* provision of the Constitution to the Washington indeterminate sentence statute. The Court held the statute inapplicable to the conviction of a crime committed before its enactment. The test governing the application of a new punitive statute to a crime already consummated, under the *Lindsey* case, is whether the retroactive action operates "to the detriment or the material disadvantage of the wrongdoer". The detriment and disadvantage to defendant wrought by the imposition of the Life sentence seem apparent. In accord with the *Lindsey* case, see *Ex parte Lee*, 177 Cal. 690, 171 P. 958; also 11 Am. Jur., Constitutional Law, Section 356.

It requires no extraordinarily high degree of perspicacity to discern that by adjudicating a person in 1958 to be a multiple offender and sentencing him to life imprisonment on account of narcotic offenses committed a) 29 years ago and b) 23 years ago respectively, served to increase his punishment for the offenses committed between 1931 and 1937. Such an application of N. Y. Penal Law, Sections

1751, subd. 3 and 1941, subd. 2 operated *ex post facto*, in violation of Article 1, Section 9, clause 3 of the Federal Constitution.

The application of a statute increasing the punishment for a crime, after the commission of that crime, is *ex post facto* and, thus, unconstitutional by virtue of Article 1, Section 10 of the Federal Constitution which reads, in part: "No state shall • • • pass any • • • ex post facto law • • • ." Cf. *Lindsey* v. *State of Washington, supra; U. S.* v. *Platt*, D. C. Tex., 31 F. Supp. 788, 792; *People* v. *D'A Philippo*, 220 Cal. 620, 32 P. 2d 962; *State* v. *Dreaux*, 205 La. 387, 17 So. 2d 559.

Federal District Court must accept meaning of state statute as interpreted by highest court of state but such interpretation cannot be applied contrary to federal constitutional rights and limitations. U. S. C. A. Const. art. 1, §10; *Thompson* v. *Graham*, 147 F. Supp. 150, reversed 246 F. 2d 805.

Federal court, in applying *ex post facto* prohibition of federal constitution to state laws, accepts meaning ascribed to them by highest court of state, but when meaning is thus established, whether standards of punishment set up before and after commission of an offense differ and whether latter is more onerous than earlier within meaning of constitutional prohibition are federal questions which federal court will determine for itself. (*Lindsey* v. *State of Washington*, 301 U. S. 397, 57 S. Ct. 797, 81 L. Ed. 1182, *supra*.)

CONCLUSION

Fact that N. Y. Penal Law Section 1941, subd. 2, imposing increased penalties for punishment for third narcotic felony offense, was not in effect when defendant was first sentenced for two prior federal convictions, made application of such section, in sentencing him as a third felony narcotic offender to a term of life imprisonment, *ex post facto*.

Dated: July 26, 1960.

Respectfully submitted,

FRANCES KAHN
Member of the Bar
of the Supreme Court
of the United States
Attorney for Petitioner
401 Broadway
New York 13, New York

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

BEFORE:

HON. STANLEY H. FULD,

Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JAMES LANA,

Defendant-Appellant.

CERTIFICATE DENYING LEAVE

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
April 22, 1960.

STANLEY H. FULD
Associate Judge

IN THE

Supreme Court of the United States

October Term, 1960

No. 270

JAMES LAXA,

Petitioner,

—against—

STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Respondent

AARON NUSSBAUM,
Assistant District Attorney,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1960

No. 270

JAMES LANA,

Petitioner,

—against—

STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement

Petitioner seeks a review of the judgment of the Court of Appeals of the State of New York entered on April 22, 1960, denying leave to appeal to that Court, from a judgment of the Appellate Division, Second Judicial Department, State of New York, 10 App. Div. 2d 646, which affirmed a judgment of the County Court of Kings County, State of New York, rendered on November 24, 1958, convicting the petitioner as a third (narcotic) felony offender upon his plea of guilty to the crime of violation of Section 1751 of the Penal Law, Subdivision 3 (possession of narcotics with intent to sell).

As a third (narcotic) felony offender, the petitioner was sentenced to Sing Sing State Prison for a term of 15 years to life, pursuant to Section 1941, Subdivision 2 of the Penal Law of the State of New York.

The Third (Narcotic) Felony Information filed by the District Attorney accused the petitioner of two previous narcotic felony convictions as follows:

The 1931 Narcotic Felony Conviction

1. The said defendant, on or about March 2, 1931, in the U. S. District Court for the Southern District of New York, of New York City, New York, was duly by law convicted upon his own confession and plea of guilty of the crime of Unlawfully dealing in and Selling Narcotic Drugs in violation of U. S. Code, Title 26, Section 692; Sections one and two, Act of December 17, 1914, as amended and U. S. Code, Title 26, Section 696, as charged in two counts of a certain indictment filed against him in the said Court, in the *first count* of which said indictment it is alleged that heretofore, to wit: on or about the 29th day of January, 1931, at the Southern District of New York, within the jurisdiction of this Court, James Lana, the defendant herein, unlawfully, wilfully and knowingly did sell to one Letty Krantz a certain quantity of a derivative and preparation of opium, to wit: one ounce, more or less, of diacetyl morphine hydrochloride, commonly known as heroin, not in the original stamped package, or from the original stamped package that is to say, that there was not affixed to the container in and from which the defendant sold the heroin as aforesaid, any Internal Revenue stamps whatsoever as required by Section 1, Act of December 14, 1914, as amended

(U. S. Code, Title 26, Section 692; Section 1, Act of December 17, 1914, as amended); and in the *second count* of which said indictment it is alleged that heretofore, to wit: on or about the 29th day of January, 1931, at the Southern District of New York and within the jurisdiction of this Court, James Lana, the defendant herein, unlawfully, wilfully and knowingly did sell to Letty Krantz a certain quantity of a derivative and preparation of opium, to wit: one ounce more or less of Diacetyl morphine hydrochloride, commonly known as heroin; that the defendant, as he then and there well knew, did sell the heroin as aforesaid, contrary to law in that the said sale was not in pursuance of a written order by the said Letty Krantz to the said defendant on a form issued in blank for that purpose by the Commissioner of Internal Revenue as provided by Section 2 of the Act of December 17, 1914, as amended (Section 2, Act of December 17, 1914, as amended; U. S. Code, Title 26, Section 696); Whereupon the said defendant, James Lana, was sentenced to imprisonment for the term of two years in the U. S. Penitentiary at Leavenworth, Kansas.

The said Crime of Unlawfully Dealing and Selling Narcotics in violation of U. S. Code, Title 26, Sections 692 and 696; and Sections 1 and 2, Act of December 17, 1914, as amended, would be felonious if the same were committed within the State of New York.

The 1937 Narcotic Felony Conviction

2. And the said defendant, on or about June 16, 1937, in the District Court of the United States of America for the Southern District of New York, at New York City, New York, before the Honorable Samuel Mandelbaum, a judge

of the said Court, was duly by law convicted upon his own confession and plea of guilty of the crimes of Unlawfully selling Narcotics and Conspiracy so to do in violation of Sections 1043 and 1044, Title 26, U. S. Code; Sections 173 and 174, Title 21 U. S. Code, and Section 88, Title 18, U. S. Code, under a certain indictment filed against him in the said Court under the name of James Lana, *in counts 1 to 18*, inclusive, in which said indictment the defendant is charged with the crime of Unlawfully selling Narcotics, and in count 19 of said indictment he is charged with the crime of Conspiracy to sell Narcotics, whereupon the said defendant James Lana was sentenced to be committed to the custody of the Attorney General of the United States or his authorized representatives, for imprisonment in a penitentiary for and during the term and period of four years on each of counts 1 to 18, inclusive, and two years on count 19, and fined $1.00 on each of 3, 6, 19, 12, 15, and 18, payment of which fines were remitted and the prison sentence on counts 1 to 19, inclusive, were to run concurrently.

The said crime of Unlawfully Selling Narcotic Drugs as charged in counts 1 to 18, inclusive, in violation of Sections 1043 and 1044, Title 26, U. S. Code and Sections 173 and 174 of Title 121 U. S. Code, would be felonious if the same were committed in the State of New York.

The Statute in Question

Section 1941, Subdivision 2 of the Penal Law of the State of New York, providing for punishment for a third narcotic felony conviction, is as follows:

"*1.* * * *

2. *A person, who, after having been twice convicted within this state, of a felony or of an attempt to commit a felony under section seventeen hundred fifty-one of this chapter or under any other law relating to narcotic drugs, or, under the laws of any other state, government or country, of a crime under any law relating to narcotic drugs which, if committed within this state, would be a felony, commits a felony under section seventeen hundred fifty-one of this chapter or under any other law relating to narcotic drugs, within this state, shall be sentenced upon conviction of such third offense to imprisonment in a state prison for an indeterminate term the minimum of which shall be not less than fifteen years, and the maximum thereof shall be his natural life.*"

Jurisdiction

The respondent objects to the jurisdiction on this petition for a Writ of Certiorari on the following grounds:

1. The petitioner has failed to raise a Federal question of *ex post facto* statute in any of the State Courts below (Rule 23(1)(f) United States Supreme Court; Title 28 U.S.C.A. Section 1257, Subd. 3).

2. The petitioner's contention of *ex post facto* legislation has been heretofore finally determined by this Court (Rule 19(1)(a). United States Supreme Court).

ARGUMENT

I.

The sole question presented by the petitioner in the State Courts below devolved on the petitioner's contention that the underlying Federal convictions were not "felonies" within the meaning of New York's multiple offender statute for the imposition of punishment to a life sentence as a third narcotic felony offender, under Section 1941, Subdivision 2 of the Penal Law of the State of New York.

In the petitioner's printed brief, submitted to the Appellate Division of the New York Supreme Court, Second Judicial Department, appears the following, at page 5:

> "We submit that two questions—purely of law—are presented here, and that these questions are necessarily dispositive of the appeal:
>
> 1. Was the County Court of Kings County (Barshay, J.) correct in ruling that the prior Federal conviction of 1937, under Sections 1043 and 1044, Title 26, U. S. Code (conspiracy) and Sections 173 and 174, Title 21, U. S. Code, amounted to a conviction of felony, under the laws of New York at that time?
>
> 2. Was the same Court correct in holding that the prior Federal conviction of 1931, under U. S. Code, Title 26, Sections 692 and 696 amounted to a conviction of felony, under the laws of New York at that time?
>
> We maintain, with all due respect, that the learned Judge below was in error; that it was not for a crime that would be a felony under New York standards at that time; that his Federal convictions, as afore-

> said, was improperly used as a predicate for additional punishment; since the Federal statutes in question in 1931 and 1937 include components of the crime which are not contained in the applicable statutes of the Penal Law and Public Health Law of this State during those years, this statute, therefore, has no counterpart under New York law, and the convictions had herein under such Federal statutes cannot be made the basis for multiple offender punishment in this State as provided by Section 1941, Penal Law."

The petitioner's contentions were thus limited, again, in the application for leave to appeal to the New York Court of Appeals, which was denied by Associate Justice Fuld of that Court.

Thus, it is clear that the question of an *ex post facto* statute was not raised in any of the State Courts below.

II.

There is a further failure of jurisdiction in that the precise question raised by the petitioner has already been heretofore determined by this Court in a closely parallel situation.

In *McDonald* v. *Massachusetts*, 180 U. S. 311, this Court definitively held that a Massachusetts statute imposing an additional punishment as an habitual offender for a third felony conviction, does not impose any additional punishment for the former crimes and is, therefore, not in violation of the Constitutional provisions against *ex post facto* laws.

In the *McDonald* case, *supra*, this Court stated:

"The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another state, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. Statutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts; and effect was given to previous imprisonment, either in Massachusetts or elsewhere in the United States, by the statute of 1827, chap. 118, Sec. 19, and by the Revised Statutes of 1836, chap. 133, Sec. 13. It is within the discretion of the legislature of the state to treat former imprisonment in another state as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only. The statute, imposing a punishment on none but future crimes, is not ex post facto. It affects alike all persons similarly situated, and therefore does not deprive anyone of the equal protection of the laws. Moore v. *Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *Ross's Case*, 2 Pick. 165; *Com.* v. *Graves*, 155 Mass. 163, 16 L. R. A. 256, 29 N. E. 579; *Sturtevant* v. *Com.*, 158 Mass. 598, 33

N. E. 648; *Com.* v. *Richardson*, 175 Mass. 202, 55 N. E. 988."

In accord is the decision of this Court, in *Graham* v. *West Virginia*, 224 U. S. 613, 623, and *People* v. *Raymond*, 96 N. Y. 38. See also, *Com.* v. *Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; *Blackburn* v. *State*, 50 Ohio St. 428, 36 N. E. 18.

III.

The petition should be denied.

Dated: Brooklyn, New York,
August, 1960.

Respectfully submitted,

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Respondent

AARON NUSSBAUM,
Assistant District Attorney,
Of Counsel.